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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court dated August 14, 1975.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland (Appendix A. 1-88 of Petition) is reported in 24 Md. App. 128, 331 A.2d 78 (1975). Neither the denial

of the motion for writ of certiorari by the Court of Appeals of Maryland (Appendix A. 92 of Petition), nor the denial of a Motion for Reconsideration of the Petition for Writ of Certiorari by the Court of Appeals of Maryland (Appendix A. 93 of Petition) are officially reported.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28, U.S.C.A., §1257 (3).

QUESTIONS PRESENTED

I. May an attorney-at-law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his[1] handwritten notes and memoranda, books and records, which were seized from his desk and files in his[2] office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of Petitioner's offices violative of Amendment IV to the Constitution of the United States?

III. Was the Petitioner denied his rights to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, because he allegedly did not receive a fair trial because of the cumulative effects of the actions of the prosecution and the State courts?

[1] and [2] The Respondent has adopted the first question presented by the Petitioner, with the exception that the word "personal" has twice been deleted purposely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner alleges that the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States are involved; as well as Article 5, Section 5 and Article 27, Section 551 of the Annotated Code of Maryland (1957); and Sections 12-201 and 12-203 of the Maryland Courts and Judicial Article of the Annotated Code of Maryland (1974).

STATEMENT

On November 1, 1972, an information was filed against the Petitioner, an attorney-at-law in Montgomery County specializing in the handling of real estate settlements, charging Petitioner with four counts of false pretenses. On November 16, 1972, the Petitioner was indicted by the Montgomery County Grand Jury on seventeen additional charges. The indictment and the information were consolidated for trial. The Petitioner elected to proceed with a jury trial, and the jury found the Petitioner guilty under Counts One and Two of Bill of Information No. 3100, and Counts Three, Four, Seven, Eight, Eleven and Twelve of Indictment No. 3103. The Petitioner was sentenced to eight concurrent two-year sentences, thereby making a total sentence of two years.

In his appeal to the Court of Special Appeals of Maryland, that Court reversed the jury verdict as to Count Two of Bill of Information No. 3100 and Counts Four, Eight and Twelve of Indictment No. 3103, and affirmed the other four convictions.

ARGUMENT

The issues in the instant case are relatively narrow and do not warrant review by this Court on certiorari. By virtue of a valid search warrant, certain business records were seized from the law offices of the Petitioner. The fact that some of the items seized may have incriminated the Petitioner would not violate the Petitioner's privilege against self-incrimination under Article V to the Constitution of the United States. Nor was the search of the Petitioner's offices violative of Amendment IV to the Constitution of the United States because the search was reasonable and, under the facts of Petitioner's case, was warranted. A review of all of the facts as they are set forth in the Argument contained herein illustrates that neither Amendment IV nor Amendment V was violated. A further review of the facts will illustrate that the Petitioner was not denied his right to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, and that the Petitioner did receive a fair trial.

It is patently clear from the record that the Court of Special Appeals of Maryland was manifestly correct in its decision. There is no important question of federal law requiring decision by this Court, and the Petition for Writ of Certiorari should be denied.

I.

THE INTRODUCTION INTO EVIDENCE OF THE HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS OF AN ATTORNEY-AT-LAW, WHICH WERE SEIZED FROM THE DESK AND FILES OF THE OFFICE OF THE ATTORNEY UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, DOES NOT OFFEND THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE.

The thrust of Petitioner's argument appears to be directed at the alleged inconsistency between the decisions in *Hill v. Philpott*, 445 F.2d 144 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971) and *United States v. Blank*, 459 F.2d 383 (6th Cir., 1972), *cert. den.* 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972). In *Hill*, the Seventh Circuit held in a two-to-one decision that the production of a taxpayer's *personal* books and records should properly be refused on the basis of a Fifth Amendment privilege against self-incrimination, even though the same had been seized pursuant to a valid search warrant. The rationale of the majority in *Hill* was grounded upon the legal premise that the taxpayer would have been afforded his Fifth Amendment right against self-incrimination had the Government sought by subpoena or summons the same personal books and records of the taxpayer.[3]

[3] The dissent in *Hill* held that the papers sought were not so intimately confidential as to enjoy a superlative privacy which would be protected from seizure upon an adequately grounded warrant. In describing the character of the papers, Judge Fairchild reasoned that the records in question were "maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were alleged kept and used, made them, in a sense, instrumentalies of the tax evasion offense claimed." *Hill v. Philpott, Id.*, at page 150.

In *Blank,* decided nearly one year thereafter, the Sixth Circuit held that worksheets of a sports and horse-book betting business which was seized under an admittedly valid search warrant would not be suppressed on Fifth Amendment grounds because they were not personal communications but were business accounts; that since they were not privately recorded and privately held thoughts or descriptions of events, these business records of which other persons would have knowledge were admissible in evidence if the same were obtained through a valid search warrant. The Sixth Circuit rejected the rationale of the majority decision in *Hill* that there is no distinction between records sought by subpoena and records sought by a search warrant. The rationale of the Court in *Blank* was set forth at page 385:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena *compels* the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant." (Emphasis added)

Although admittedly a Sixth Circuit case, *United States v. Beck,* 511 F.2d 997 (6th Cir., 1975) appears to be the most recently reported Circuit Court of Appeals case pertaining to the issue at Bar. In reaffirming its position in *Blank,* the Court stated at pages 1002-1003:

> "Admitting properly seized 'personal papers' cannot violate the Fifth Amendment privilege against self-incrimination. Unlike an order which 'compels' production of evidence, *Boyd, supra,* 116 U.S. at 618, 6 S. Ct. 524, 29 L. Ed. 746 the owner of a notebook uncovered in a search in his absence is

under no compulsion. See United States v. Blank, 459 F.2d 383, 385 (6th Cir. 1972), rev'g 330 F. Supp. 783 (N.D. Ohio 1971); United States v. Murray, 492 F.2d 178, 191 (9th Cir. 1973); United States v. Scharfman, 448 F.2d 1352, 1355 (2d Cir. 1971), cert. denied, 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972). But see Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971). Being unaware of the search, he has no choice. Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations 6 Loyola (Cal.) L. Rev. 274, 290 n. 93 (1973). Couch v. United States, 409 U.S. 322, 327-336, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973), established that mandated cooperation, rather than the 'privacy' of the owned papers, is the *sine qua non* of the privilege against self-incrimination. See Comment, The Protection of Privacy by the Privilege Against Self-Incrimination: a Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336 (1974). Similarly, though 'testimonial' evidence was seized in United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), the Court sustained the admission of such uncompelled evidence without feeling even the need to discuss the privilege against self-incrimination.

"Though the overall search and seizure is proper and though there is no compelled cooperation, the search and seizure of the papers must also be 'reasonable.' As the Second Circuit so aptly said,

> 'The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I Have Performed.' Similarly the abhorrence generally felt with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.' United States v. Bennett, 409 F.2d

888, 897 (2d Cir.), cert. denied sub. nom., Haywood v. United States, 396 U.S. 852, 90 S. Ct. 113, 24 L. Ed. 2d 101 (1969), Thomas v. United States, 402 U.S. 984, 91 S. Ct. 1670, 29 L. Ed. 2d 149 (1971).

The 'search' of the spiral notebook for its communicative value and for fingerprints, see United States v. Hill, 454 F.2d 282 (9th Cir. 1972), under the present circumstances, was hardly unreasonable in that, as in *Bennett*, there was no extensive 'rummaging.' Though appellate counsel has characterized the notebook as appellant's 'private diary' (Appellant's Reply Brief at 22), the 'diary' consisted of just one page, the first page, in fact, of the notebook. United States v. Gargotto, 510 F.2d 409 (6th Cir. 1974), sustained the reasonableness of a search involving much greater 'rummaging.' Cf. *Philpott, supra* (more than thirty cartons of records seized); United States v. Zive, 299 F. Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers.)"[4]

A review of the pertinent cases cited in *Beck* reveals that the Second Circuit and Ninth Circuit also have adhered to the proposition set forth in *Blank, i.e.,* the seizure of business records by virtue of a warrant reasonable under the Fourth Amendment requirements may be introduced into evidence over a Fifth Amendment objection. In *United States v. Scharfman,* 448 F.2d 1352 (2nd Cir., 1971), *cert. den.* 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972), there was a search and seizure warrant issued for the recovery of furs from a highjacked fur shipment. During the course of the seizure of the furs, index cards and a consignment memorandum book were seized. In disposing of this point, the Court stated at page 1355:

[4] Testimony in the instant case revealed a seizure of less than 5% of Petitioner's files.

"Scharfman also argues that the memo book, containing entries written in his own hand, should have been suppressed because the fifth amendment would permit him to refuse to produce such evidence if he had possession. His analogy is inapposite. We held in United States v. Bennett, 409 F.2d 888, 896, cert. denied, sub nom. Jessup v. United States, 396 U.S. 852, 90 S. Ct. 376, 24 L. Ed. 2d 256, reh. denied, sub nom. Haywood v. United States, 396 U.S. 949, 90 S. Ct. 376, 24 L. Ed. 2d 256 (1969), that 'the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth.'"

The Ninth Circuit, in *United States v. Murray,* 492 F.2d 178 (9th Cir., 1973) commented at page 191:

"3. *Seizure of address book.* Murray argues that the seizure and use in evidence of his address book and entries therein violated his Fifth Amendment privilege against self-incrimination. Murray relies primarily upon an observation by Justice Bradley in Boyd v. United States, 116 U.S. 616, 633, 6 S. Ct. 524, 29 L. Ed. 746 (1886), to the effect that the seizure of a person's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself.

"*Boyd* involved a self-incrimination problem because the defendant was required by court order to produce a self-incriminating invoice. No such circumstance is present here. Actually, Murray's address book could have been seized as an instrumentality of the crime under the law as it existed prior to Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), which overturned the 'mere evidence' rule. *Hayden,* of course, liberalized the rule as to what items may be seized.

"In *Hayden,* however, the court reserved the question of whether, in a search and seizure otherwise valid, the authorities could, in view of the privilege against self-incrimination, take items

which are 'testimonial' or 'communicative' in nature. *See Hayden,* at 302-303, 87 S. Ct. 1642. But in United States v. Bennett, 409 F.2d 888, 896 (2d Cir. 1969), the Second Circuit held that such items can be taken during a lawful search and seizure and are admissible. We agree."

In addition to the above, this Court in *Couch v. United States,* 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 548 (1973) also appears to hold that there is a distinction between an order to produce records and the seizure of records under the authority of a warrant. In addition, in footnote 10 this Court also appeared to make the further distinction between *personal* papers and other papers in the handwriting of the accused, stating:

"A later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.*' United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251, 88 L. Ed. 1542 (1944)." (Emphasis in the original)

It is for this reason that the Petitioner's reliance on *Hill,* as well as Petitioner's contention itself, are without merit. The papers seized in the instant case were not *personal* within the contemplation of the various cases. Rather, the papers seized were no more than records kept in the ordinary course of Petitioner's practice of law and reflected such items as deeds, mortgages, deeds of trust, memoranda of settlements, and the like. These were papers which were prepared as a necessity for clients, rather than papers of a purely personal nature which referred only to the Petitioner.

At first blush, it might appear as though the respective holding of the Seventh Circuit in *Hill* is

inconsistent with the holdings of the Sixth Circuit in *Blank,* the Second Circuit in *Scharfman* and the Ninth Circuit in *Murray,* which inconsistency might warrant the granting of certiorari. However, this Court appears to have already held that items lawfully seized as an incident to a valid arrest are admissible in evidence over a Fifth Amendment objection in a situation wherein the personal papers were so closely related to the business that the papers were determined to be business records. In *Marron v. United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), Marron claimed that a ledger and certain bills for gas, electric light, water and telephone services, which were obtained through an illegal search and seizure, should have been excluded because of a violation of his Fourth and Fifth Amendment rights. After holding that the items in question were not admissible pursuant to the search warrant because the same were not particularly described as things to be seized (intoxicating liquors and articles for their manufacture were described in the warrant), this Court allowed the items to be introduced in evidence for the following reason:

"The bills for gas, electric light, or, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest." 48 S. Ct. at 77; 275 U.S. at 199.

It is, therefore, evident that this Court has already ruled that the Fifth Amendment privilege against self-incrimination will not attach in situations where evidence is otherwise legally obtained. While it may be true that the evidence in *Marron* was admissible by virtue of a valid arrest, the Respondent would submit

that the seizure of such items pursuant to a search warrant would be admissible in evidence by analogy. The records in *Marron* were allowed in evidence as closely related to the business of Marron. In similar fashion, the records seized from the Petitioner were actually used in carrying on the Petitioner's profession as an attorney-at-law. Furthermore, the seized records were not personal by any stretch of the imagination, and even though the papers may have been in Petitioner's handwriting, the seized records were nothing more than business records.

As a further illustration that certiorari should not be granted in the instant case by virtue of the cases previously decided by this Court, it need only be pointed out that this Court has previously denied certiorari in *Blank* (6th Circuit) and *Scharfman* (2nd Circuit).

Petitioner's reliance upon *Bellis v. United States*, 417 U.S. 85, 94 S. Ct. 2179, ___ L. Ed. 2d. ___ (1974) is totally unfounded. Unlike the facts in the instant case where a warrant issued, Bellis was subjected to a *subpoena* for certain partnership records. The Respondent acknowledges the difference between a valid search and seizure warrant on the one hand and a subpoena on the other hand. In the former, an individual is not compelled to incriminate himself; in the latter, an individual would have to bring the records to the proper governmental authority and might thereby be incriminating himself.

The Respondent would take issue with the blunt statement of the Petitioner that this Court in *Bellis* "cited with unanimous approval" the holding in *Hill* (Br. 16). True, this Court in *Bellis* apparently cited *Hill* as holding that the privilege against compulsory self-incrimination applies to business records of a sole practitioner as well as to his personal documents containing more intimate information about the individual's private life. However, the Respondent would submit that the use of a citation is a far cry from an unanimous statement that no business records of a sole practitioner are subject to a valid search and seizure warrant.

For the foregoing reasons, the Respondent would submit firstly that the items seized under the valid search and seizure warrant were not personal to the Petitioner, and were therefore admissible into evidence. Secondly, unlike records requested for the issuance of a subpoena which might compel the person to give incriminating evidence against himself, items legally seized under the authority of a valid search and seizure warrant in accordance with the Fourth Amendment do not offend the Fifth Amendment guarantee against compelled self-incrimination.

II.

THE SEARCH OF PETITIONER'S OFFICES WAS NOT VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

(A) *Search Warrants Were Introduced Into Evidence.*

The Respondent does not take issue with the authority cited by the Petitioner that a search warrant under which the evidence was obtained must be introduced in evidence (Br. 23). The short answer to Petitioner's contention lies in the fact that the search warrant was apparently introduced into evidence (A. 28-33).

(B) *The Warrants in the Instant Case Did Not Amount to "General" Warrants.*

The Petitioner appears to acknowledge that the warrants in the instant case described with particular-

ity the items to be seized. However, Petitioner argues that the addition of the words "together with other fruits, instrumentalities and evidence of crime at this time unknown" would cause the particular warrants to become general warrants. In explaining the additional words, the Court of Special Appeals concluded:

> "A reading of the warrants *in full*, however, makes it apparent that the suspect phrase is tied explicitly to those items which might show a violation of the false pretenses law with respect to the sale of Lot 13T" (A. 34). (Emphasis added)

The Respondent adheres to the reasoning of the Court of Special Appeals of Maryland, especially in light of the fact that this Court has oft times held that an affidavit should be interpreted in a common-sense and not a hypothetical manner, and that the resolution of doubtful or marginal cases should be largely determined by the preference accorded to warrants. *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741 (1965).

(C) *It Was Not Impossible For The Trial Judge Who Issued the Warrants to Have Made The Finding That Probable Cause Was Demonstrated That A Crime Was Being Committed on the Premises.*

Petitioner contends that since one of the elements of the crime of false pretenses includes a false representation of *a past or existing fact*, it is impossible for the affidavit in the warrant to set forth that there is probable cause to believe that the laws relating to false pretenses *are being* violated upon the premises. Petitioner believes that it is not possible for a crime to be *presently* being committed, when one of the elements of the crime itself is a false representation of a past or existing fact. However, the above allegations are merely a play on words. Section 551 of Article 27 of the

Annotated Code of Maryland (1974 Cum. Supp.) provides that a search warrant may issue under a proper application and affidavit for any building wherein property subject to seizure under the criminal laws of the State is situated or located. It is apparent that the use of the phrase in the affidavit that the crime was presently being committed relates to the documents which were then on the premises. To hold otherwise, a warrant could never issue in a case of false pretenses because the facts represented would have already been acts of past history.

In addition to reliance upon *Ventresca* with relation to the preference to be afforded warrants, the Respondent also submits that *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) is sufficient to dispell the argument of the Petitioner. *Hayden* made it clear that any evidence of a past crime is subject to seizure under the Fourth Amendment.

(D) *The Principals and Prefaces Annunciated By This Court in Warden v. Hayden, Id., were not Violated By The Court of Special Appeals in Upholding The Admission of Certain Items into Evidence Which Were Obtained By the Search and Seizure in Question.*

Petitioner takes issue with regard to several other items seized, which did not specifically relate to Lot 13T. In particular, the Petitioner refers to the opinion of the Court of Special Appeals:

> "Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake or lack of

> knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of the appellant's *mens rea,* we hold that they too were seizable evidence under the warrants. Alternatively, they were evidence of other crimes, their character as criminal evidence obvious to the searching party by the requisite standard of probable cause, and, therefore, seizable warrantlessly under the Plain View Doctrine." (A. 47-48).

Relying upon *Warden v. Hayden, supra,* the Petitioner contends that the papers seized "were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses." (Br. 28). The crime of false pretenses is committed when a person (1) by making a false representation of a past or existing fact (2) with intent to defraud, and (3) with knowledge of its falsity, (4) obtains any chattel, money or valuable security from another (5) who relies on the false representation (6) to his detriment. *Polisher v. State,* 11 Md. App. 555, 276 A.2d 102 (1972). By the very definition and elements relating to false pretenses, it is incumbent upon the prosecutor to show that there was an intent to defraud, rather than a mistake on behalf of the accused. For this reason, it was permissible in the instant case for the other items seized to be introduced into evidence to show a general pattern of operation, rather than a mistake, on the part of the Petitioner with respect to unreleased deeds of trust on properties other than Lot 13T. This Court has also adhered to the same doctrine. In *Nye & Nissen, et al. v. United States,* 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949), a case involving the substantive crime of false pretenses, this Court cited with approval the introduction of evidence of crimes similar to those charged in order to prove the guilty

intent of the accused. At page 618 of 336 U.S., this Court stated:

> "The evidence showed the presentation of eleven other false invoices. This was part of the evidence received in support of a conspiracy count. The trial court also admitted it at the conclusion of the case 'for the sole purpose of proving guilty intent, motive, or guilty knowledge' of the defendants. Evidence that similar and related offenses were committed in this period tended to show a consistent pattern of conduct highly relevant to the issue of intent."

(E) *The Two-Pronged Test of Credibility-Liability and Trustworthiness of the Non-Swearing Informants Was Satisfied.*

Relying upon *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974), the Petitioner challenges the veracity of the informants set forth in the affidavit to the warrant. As aptly pointed out by the Court of Special Appeals in its opinion, *Aguilar* related to the rule set forth for the establishing of the credibility of unnamed police informers rather than disinterested civilian sources of information (A. 42-44). In the instant case, secondary sources of information were all named and identified in the affidavit. These named individuals were either victims of the crime, disinterested civilian sources of information, or other law enforcement officers. For this reason, the Petitioner's contention is without merit.

III.

THE PETITIONER WAS NOT DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES BECAUSE HE ALLEGEDLY DID NOT RECEIVE A FAIR TRIAL BECAUSE OF THE CUMULATIVE EFFECTS OF THE ACTIONS OF THE PROSECUTION AND THE STATE'S COURTS.

The Petitioner has set forth fifteen "problems encountered" by him, which he contends denied him due process of law when considered with the closing remarks of the prosecutor. Taken individually or collectively, the Petitioner's Fourteenth Amendment rights were not violated.

1. Petitioner refers to prejudicial pre-trial publicity which required removal of his trial from his home county to another county in the State of Maryland. Since Petitioner's motion for removal was granted, it is difficult to comprehend any error whatsoever.

2. Petitioner refers to an initial "overcharge" of the indictments, a denial for request of a severance, and an abandonment of most of the charges without proof. The Respondent is unable to find any authority (nor is any authority advanced by the Petitioner) which holds that there is a limit to the number of counts and/or indictments to be filed against an accused. The abandonment of the charges because of a lack of proof merely illustrates that the Petitioner was afforded due process of law. With regard to the motion for severance, this motion lies within the sound discretion of the trial judge, and will not be overruled unless there is an abuse of discretion. *Baumgartner v. State,* 21 Md. App. 251, 319 A.2d 592 (1974). As gleaned from that portion of the trial judge's opinion (A. 69), it is patently clear that the trial judge did not abuse his discretion in denying the severance.

3. With reference to Petitioner's motion for a continuance, the granting or denial of a continuance also lies within the sound discretion of the trial judge. *Nichols v. State,* 6 Md. App. 644, 252 A.2d 499 (1969). The facts relating to the continuance set forth in the opinion (A. 68) obviously show a lack of an abuse of discretion on the part of the trial judge.

4. As noted in the opinion of the Court of Special Appeals (A. 73-75), Petitioner's motion for a Court En Banc was not timely filed.

5. Petitioner acknowledges that the issues concerning the warrants in the instant case have been previously discussed in Argument herein (Br. 31).

6. With reference to the instructions, the Respondent would refer to the opinion of the Court of Special Appeals which more than adequately illustrates that there was no error in the instructions or in the refusal to grant specific instructions. The exact language of requested instructions need not be adopted, but it is sufficient that they are or have already been given in substance. *Sugarman v. United States,* 249 U.S. 182, 39 S. Ct. 191, 63 L. Ed. 550 (1919).

7. Relying upon *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Petitioner contends that a written immunity agreement had not been revealed to the Petitioner even after a request for discovery. However, the immunity agreement was not exculpatory nor material evidence within contemplation of *Brady,* nor was it suppressed by the prosecution within the contemplation of *Brady.* The immunity agreement was introduced into evidence without objection (A. 65). Clark, with whom the immunity agreement was made, was listed as a State witness in discovery proceedings.

Petitioner also argues that he should have been advised of his *Miranda* warnings because Petitioner conferred frequently with Clark. As pointed out by the Court of Special Appeals (A. 65):

> "The point is moot, since no such conversations were introduced in evidence."

8. Assuming *arguendo* that there was a tardy response to a granted bill of particulars, or that the response was evasive and incomplete with regard to proper addresses of the 54 respective witnesses, Rule 728 of the Maryland Rules of Procedure carries no exclusionary sanction for non-compliance. In addition, the Petitioner could have requested a continuance in order to have adequate time to review the responses. Having failed to do so, the Petitioner cannot now claim error. See also Rule 16 of the Federal Rules of Criminal Procedure.

9. Petitioner argues that his Motion for New Trial should have been granted. The Respondent refers to and relies upon that quoted portion of 58 Am. Jur. 2d, *New Trial* § 175 at p. 391, which appears in the opinion of the Court of Special Appeals (A. 80).

10. Petitioner contends that he was sentenced under criticism for maintaining his innocence when he did not testify at trial. A conviction for false pretenses in the State of Maryland permits a maximum sentence of ten years, while a conviction for fraudulent misappropriation carries a term from one to five years. In each instance of his eight[5] convictions, the Petitioner received but a two-year sentence, and all sentences were to run concurrently. Under these factors, it is apparent that there was "no inpropriety in the sentencing hearing

[5] As previously noted, four convictions were reversed.

and no demonstration of ill will, passion, prejudice or any unworthy motive" (A. 83).

11. The test in a jury trial in Maryland on a motion for a judgment of acquittal is:

> ". . . whether the admissible evidence adduced at the trial either showed directly, or circumstantially, or supported a rational inference of, the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the appellant's guilt of the offense charged . . ." (A. 77-78).

This was the test used by the trial judge, and the use of this test was not error.

12. Petitioner acknowledges that his contention that the trial judge refused to suppress wrongfully seized evidence has previous been discussed. The Respondent would rely on the previous argument herein to answer the same.

13. Without citing any specific alleged adverse rulings or authority to substantiate the same, the Petitioner merely contends that the trial judge made numerous adverse rulings on evidence. It is submitted that any ruling on evidence against an accused would be adverse, but not necessarily prejudicial. The Respondent would rely upon the opinion of the Court of Special Appeals in answering Petitioner's contention (A. 69-73).

14. Petitioner next contends that the Court of Special Appeals refused to reply to Petitioner's major contentions, "especially as to lack of jurisdiction, and its application of past decisions of the case . . ." (Br. 32). There are no specific contentions, nor is there any authority cited by the Petitioner to support his allega-

tions. It is evident that the court trying the Petitioner had jurisdiction, and assuming that the "past decisions of the case" refer to Clark-King Construction Co., and *Andresen v. Salter, et al.*, 269 Md. 494, 307 A.2d 485 (1973) and *Andresen v. Bar Association of Montgomery County*, 269 Md. 313, 305 A.2d 845 (1973), the opinion of the Court of Special Appeals is replete with references to these two cases.

15. Petitioner also argues that the Court of Appeals failed to state its reason for a denial of certiorari. However, a review of the record (A. 92) reveals that the Court of Appeals denied Petitioner's Writ of Certiorari "as there has been no showing that review by certiorari is desirable and in the public interest."

In concluding, the Petitioner argues that the burden of showing error was harmless beyond a reasonable doubt is upon the prosecutor (Br. 33). However, the Petitioner has failed to show any error in the first instance. In his appeal to the Court of Special Appeals, the Petitioner raised twenty-seven specific issues and then twenty-six additional issues in a similar fashion as the Petitioner has raised these final fifteen contentions. The Court of Special Appeals reasoned: "Twenty-six times nothing is nothing" (A. 88). The Respondent would submit that under Petitioner's total argument that he was denied due process and equal protection of the laws, fifteen times nothing is nothing. Petitioner has a constitutional right to a "fair trial" but not necessarily to that seldom experienced rarity, a perfect trial. *State v. Babb*, 258 Md. 547, 267 A.2d 190 (1970). A review of the record illustrates clearly that the Petitioner received a fair trial, and none of the above allegations of the Petitioner show otherwise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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